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14. ABSTRACT The significance of American sealift is evident throughout history from its deficiency in the Spanish-American War to its abundance in WW II. Despite the adoption of the Voluntary Intermodal Sealift Agreement (VISA), which updated the contingency sealift process, its good intentions do not provide a long-term solution. From a conceptual standpoint, it is valid. From a realistic standpoint, it is not and the diagnosis remains the same: insufficient U.S. flag shipping. Maritime legislation, over the last century, attempted to cure that ailment, but the U.S. flag fleet continues to shrink in spite of it. Many argue that the use of foreign flag shipping is the answer, yet there are potential, even significant risks to adopting such a plan. However, globalization and new international and national maritime security measures are variables that the sealift equation needs to more deeply address and creatively embrace. That is where the solution lays because VISA is not a durable answer to augmenting organic sealift in a time of crisis.					
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VISA: What should be in America's sealift wallet?

by

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

Signature: _____

3 May 2010

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Abstract

VISA: What should be in America's sealift wallet?

The significance of American sealift is evident throughout history from its deficiency in the Spanish-American War to its abundance in WW II. Despite the adoption of the Voluntary Intermodal Sealift Agreement (VISA), which updated the contingency sealift process, its good intentions do not provide a long-term solution. From a conceptual standpoint, it is valid. From a realistic standpoint, it is not and the diagnosis remains the same: insufficient U.S. flag shipping. Maritime legislation, over the last century, attempted to cure that ailment, but the U.S. flag fleet continues to shrink in spite of it. Many argue that the use of foreign flag shipping is the answer, yet there are potential, even significant risks to adopting such a plan. However, globalization and new international and national maritime security measures are variables that the sealift equation needs to more deeply address and creatively embrace. That is where the solution lays because VISA is not a durable answer to augmenting organic sealift in a time of crisis.

Would you rely on a program to augment sealift in a time of crisis that starts with the word “Voluntary”? The 1997 National Security Strategy (NSS) emphasized that the United States must maintain the ability to rapidly defeat initial enemy advances short of enemy objectives in two theaters, in close succession¹—a lofty aim and one with which the United States continues to wrestle. The Voluntary Intermodal Sealift Agreement (VISA) was crafted after Desert Shield and Desert Storm, adopted in 1997, and provides a mediocre contingency sealift solution for military planners. Ironically, VISA is inherently a good concept coupled with inadequate means to make it a valid, long lasting solution. The United States needs and deserves a better alternative to augment its organic sealift capability, and foreign flag shipping just might be the answer.

Voluntary Intermodal Sealift Agreement

The purpose of VISA is to provide a responsive transition from peacetime to contingency sealift operations, using pre-coordinated agreements to support Department of Defense (DoD) contingency requirements. More precisely, it is a contractual arrangement for obtaining time-phased access to militarily useful U.S. flag commercial dry cargo capacity, infrastructure and intermodal capability.²

Of the three sealift mobility programs that exist today, VISA is probably the most viable. The other two options, the Sealift Readiness Program (SRP) and Effective U.S. Control (EUSC) of shipping, are held in reserve should VISA fail to provide adequate sealift. SRP, developed in the 1970s, is similar to VISA in that it is also comprised of U.S. flag carriers, but the difference is that none are enrolled in VISA. Should it too fail, the last resort is the requisitioning of U.S.-owned vessels under U.S. or Effective U.S. Control (EUSC). Effective U.S. control is defined as vessels owned by a U.S. company but registered in another country—flying a foreign flag.³ The goal of the three programs is the same: provide additional sealift capability. While VISA is the most creative, none have the means to achieve the objective. They seem to focus more around preserving the American flag

¹ “National Security Strategy for A New Century,” May 1997. <<http://www.fas.org/man/docs/strategy97.htm#I-implementing>> (16 APR 2010).

² “U.S. Transportation Command Pamphlet 10-1: VISA (Voluntary Intermodal Sealift Agreement) and the Sealift Mobilization Programs,” 21 September 1998, <http://www.acq.osd.mil/log/tp/VISA_pamphlet_1998.pdf> (12 March 2010).

³ Ibid.

merchant marine and shipbuilding industry rather than developing a long-term contingency sealift strategy, and maritime policy and legislation has not helped much either despite its perceived good intentions.

Military Transportation Act of 1904

One of the earliest influences on sealift dates back to the turn of nineteenth century and the Spanish-American War. While the war was over almost before it started, lasting only a brief 10 weeks, an important lesson came from the fighting in the Philippines and U.S. attempts to support such long resupply lines. After the U.S. exhausted organic sealift assets to support the Philippines, it was compelled to charter some 51 foreign vessels, costing nearly \$10,000,000—in 1898. The lesson learned was that U.S. shipping would cost far less to acquire and operate, and would be available at once to provide sealift support. It also had an inherent problem and the same problem still exists today.⁴ The Merchant Marine and Fisheries Committee produced a report shortly after the war that summarized the issue:

But domestic vessels adapted for this purpose [to augment sealift] cannot be expected to be available unless in a time of peace they can be built and operated in some business promising a fair profit to their owners. This cannot be assured at the present time under the competition of vessels of other nations, built, maintained, and operated cheaper than American vessels can possibly be.⁵

This lesson resulted in the Military Transportation Act of 1904, which required that supplies shipped from the United States for Army and Navy forces stationed in the Philippines be transported in ships registered under the flag of the United States. Although amended many times since, the 1904 Act is still law and provides that "Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps."⁶

⁴ Stacey L. Jones, "History of the Voluntary Intermodal Sealift Agreement (VISA)," Thesis, Naval Post Graduate School, June 2002: 6.

⁵ Robert W. Kesteloot, "The U.S. Flag-Merchant Marine: A Century in Review," Navy League of the United States 2000 Almanac of Seapower, 2000: 37-44.

⁶ *Ibid*, 37-44.

Merchant Marine Act (MMA) of 1920

During WWI, the U.S. had increased its sealift capacity dramatically to support the war and afterwards faced the uncertain task of disposing of the excessive government vessels. The passage of the Merchant Marine Act (MMA) of 1920 created rules to deal with the disposal or sale of those vessels, but more importantly it provided an additional cabotage⁷ law at the direction of Senator Wesley L. Jones of Washington. His contribution to the law restricted maritime trade between states to ships built in the United States, registered in the United States, and manned by American citizens. Subsequently, the Act is more commonly referred to as the Jones Act.⁸

Despite providing provisions for the sale of the fleet, the MMA also recognized the need to preserve some part of it to serve as a naval or military auxiliary owned and operated by private citizens of the United States.⁹

Merchant Marine Act of 1936

The Merchant Marine Act of 1936, with only minor changes to the policy statement in the 1920 Act, emphatically added that, "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a Merchant Marine." The 1936 Act also recognized the need for direct subsidies to cover the cost differentials between American and foreign seafarers and between American and foreign shipbuilders—a prediction made roughly 30 years earlier by the Merchant Marine and Fisheries Committee.

These cost offsets became officially known as the Operating Differential Subsidy (ODS) and Construction Differential Subsidy (CDS). In exchange for receiving those subsidies, companies had to enroll in the Sealift Readiness Program (SRP), managed by Military Sealift Command, and subsequently had to commit 50% of their cargo capacity, in ships, when DoD mandated. While maybe a good idea at the time, subsidizing a for-profit

⁷ Cabotage is defined as trade or navigation in coastal waters.

⁸ Kesteloot, 37-44.

⁹ Ibid, 37-44.

industry, propping it up artificially for lengthy periods of time, without a sound plan to eventually discontinue that subsistence, is doomed to have negative repercussions.¹⁰

The birth of the Voluntary Intermodal Sealift Agreement

Efficient and effective execution of sealift needs in Operation Desert Shield and Desert Storm, while seemingly obvious, might only appear superficial when more closely scrutinized,¹¹ which is somewhat puzzling considering the United States did not even activate the SRP. During the war, the United States Transportation Command (USTRANSCOM) promoted containerization, for the first time, as a more efficient alternative to moving military equipment. From this experiment it hoped to speed deployment by capitalizing on the commercial industry's intermodal expertise and capabilities.¹²

Shortly after Iraq invaded Kuwait, military specialists and industry representatives met and created the Special Middle East Shipping Agreement (SMESA). It was a uniquely flexible document that incorporated all terms and conditions necessary to meet changing logistics situations while simplifying the administration in a combat theater of operations.¹³ U.S. shipping companies transported containerized cargo aboard regularly scheduled United States-Middle East routes to transshipment points where their cargo was transferred to smaller foreign-flag feeder vessels under charter. Containers traveled inland using the commercial companies' established infrastructure.¹⁴ Its successful use of intermodalism, containerization, foreign flag shipping, and the perceived failure of the SRP, laid the foundation for what became the VISA program.¹⁵ However, the lack of credible, direct interdiction threat to sealift might better explain the success SMESA achieved.¹⁶

¹⁰ "U.S. Transportation Command Pamphlet 10-1: VISA (Voluntary Intermodal Sealift Agreement) and the Sealift Mobilization Programs," 21 September 1998, <http://www.acq.osd.mil/log/tp/VISA_pamphlet_1998.pdf> (12 March 2010).

¹¹ Andrew E. Gibson and Jacob L. Shuford, "Desert Shield and Strategic Sealift," Naval War College Review, 44, (Spring 1991): 7.

¹² Shane P. Daniels, "Analysis and Evaluation of the ability of the Voluntary Intermodal Sealift Agreement to support U.S. sealift requirements during two nearly simultaneous major regional conflicts," Thesis, Naval Post Graduate School (Monterey: Naval Post Graduate School, 1999).24.

¹³ Thomas L. Strausbaugh, "The Special Middle East Shipping Agreement (SMESA)," Defense Transportation Journal, Vol. 47 (1991), No. 2: 19-20.

¹⁴ James K. Mathews and Cora J. Holt, So Many, So Much, So Far, So Fast (University Press of the Pacific 2002), 182.

¹⁵ Daniels: 15.

¹⁶ Ronald F. Frost, John F. Addams and John J. Nelson, "Sealift in Operation Desert Shield/Desert Storm: 7 August 1990 to 17 February 1991," Center for Naval Analysis, CRM 91 -109, May 1991: 9.

Maritime Security Act

In 1997 this Act became law and subsequently established the Maritime Security Program (MSP)—a new form of subsistence. It supplanted the ODS, which was a substantial annual source of revenue for American companies, contributing roughly \$3.9 million per ship per year since 1936 to those that qualified. One might loosely argue that the MSP does the same thing as ODS, but only to a lesser monetary degree.¹⁷ However, without MSP, and its close integration with VISA, VISA would probably be a complete failure.

The MSP is a national defense sealift program that provides commercial assistance to U.S. ocean ship operators, primarily containership operators. It makes ships and their crews, and the intermodal transportation and communication network of the ship operator available for sealift to the DoD upon request, much like VISA. The byproduct of accepting assistance from the MSP requires committing 100% of those ships to the VISA program.¹⁸ So, in that respect, the “voluntary” part of VISA is somewhat misleading. From 1997 to 2005, congress awarded \$100 million a year to the MSP to support a maximum of 47 ships, which comes to about \$2.1 million per ship. The Maritime Security Act of 2003 (MSA 2003), signed into law in 2004, created a new MSP for FY 2006 through FY 2015. The new Act increased support for up to 60 ships and annual funding incrementally grew throughout the new term. By the last four years, annual appropriation will increase to \$186 million, roughly \$3.1 million per ship, to support the operation of U.S. flag vessels in the foreign commerce of the United States.¹⁹

Despite this miniscule monetary footprint, by military standards, it is by no means trivial to the success of the program. MSP funding each year is potentially tenuous as it is subject to annual appropriation, which includes the additional uncertainty of operating under a continuing resolution.²⁰ What does this mean and imply for military operations? All MSP Operating Agreements shall be terminated and each participant shall be released from its obligations under the MSP operating agreement in the event that congress does not

¹⁷ Stephen J. Thompson, “The Maritime Security Program (MSP) in an International Commercial Context: A Discussion,” Congressional Research Service Report for Congress, 98-864, October 1998: 3.

¹⁸ *Ibid*, 3.

¹⁹ MSP Brochure, February 2010, <http://www.marad.dot.gov/documents/MSP_Brochure.pdf> (7 April 2010)

²⁰ “MSP Brochure February 2010,” *Maritime Administration*, February 2010, http://www.marad.dot.gov/documents/MSP_Brochure.pdf (accessed April 7, 2010)..

appropriate funds.²¹ More poignantly, MSP participants provide more than 77% of VISA commitments, and American President Lines (APL) and Sealand vessels make up half of that 77%.²² Today, foreign companies own APL and Sealand, once regarded as the face of the U.S. merchant marine. In 1999, A.P. Moller – Maersk Group, a Danish business conglomerate, took over Sealand Services Incorporated²³ and in 1997, Neptune Orient Lines (NOL), a Singapore-based global transport company, acquired American President Lines.²⁴ Only through clever contractual agreements are those vessels allowed to remain in the MSP. In a round about kind of way, though, one might say that the United States is actually subsidizing foreign companies.

Role of Cargo Preference

In 1970 there were more than 900 general cargo and dry bulk carriers. In 1998 that number had fallen to 209, but that is somewhat misleading as the size of vessels, their cargo carrying capacity and efficiency of delivery increased; total cargo carrying capacity during that time only dropped 25%.²⁵ As of 2008, the total number of U.S. flagged vessels over 10,000 deadweight tons and engaged in foreign trade stood at 87. The main reason for the continued decline centers largely on the fact the U.S. ships cost so much to operate. A substantial portion of that cost results from a very high standard of safety and environmental compliance as well as high seagoing personnel costs.²⁶

In 1991—or 1989 depending on interpretation—the cold war ended and with it ended almost a half-century of clear military strategy.²⁷ Subsequently, the amount of government generated cargo decreased and by 1993 the residual effects to the U.S. merchant marine were starting to become evident. In March of that year, APL and Sealand, the two largest U.S. flag liner companies, began developing plans to withdraw ships from U.S. registry (due to

²¹ Ibid, 296.30(g).

²² MSP Brochure, February 2010, <http://www.marad.dot.gov/documents/MSP_Brochure.pdf> (7 April 2010).

²³ “History of Maersk,”

<<http://www.maersk.com/AboutMaersk/WhoWeAre/Pages/History.aspx?SSItemId=10>> (16 April 2010).

²⁴ “Neptune Orient Lines Ltd To Acquire APL Limited For \$33.50 Per Share,” *Business Wire*, 13 April 1997, <<http://www.encyclopedia.com/doc/1G1-19306143.html>> (16 April 2010).

²⁵ Thompson, 4.

²⁶ Ira Lewis and Daniel Y. Coulter, “The Voluntary Intermodal Sealift Agreement: Strategic Transportation for National Defense,” *Transportation Journal*, (Fall 2000): 32.

²⁷ “NSC 68: United States Objectives and Programs for National Security,” 14 April 1950, <<http://www.mtholyoke.edu/acad/intrel/nsc-68/nsc68-1.htm>> (18 APR 2010).

profits becoming more difficult to achieve).²⁸ It is now 2010 and those same companies are no longer U.S. owned, but the majority of their ships conveniently fly the U.S. flag.

Present government cargo conditions are ironically similar to the Cold War, at least from a sealift perspective. APL and Sealand bottoms carry the majority of sustainment cargo delivered to support the U.S.-led conflicts in Afghanistan and Iraq. Why? Because their ships are enrolled in the MSP and they rightly take advantage of the cargo preference entitlements the program offers.²⁹ If these vessels were from U.S. owned and operated companies, this arrangement might be slightly more palatable, but they are not. When the U.S. manages to extricate itself from both of those conflicts or, at least, significantly reduce its military footprint, one might wonder what will happen to the U.S. flagged, Maersk and NOL owned ships, which can no longer make a buck off of cargo preference. The logical business decision might be to reflag those vessels and place them in service areas where they can earn a profit, thus eliminating 77% of VISA assets—and who could blame them.

The conclusion is that cargo preference is a key incentive along with the MSP subsidy that keeps participants interested and volunteering for VISA. Those same benefits, arguably, contribute to maintaining a somewhat viable U.S. merchant marine and sustain a labor pool with trained licensed and unlicensed U.S. merchant mariners. But, when one really gets into the nuts and bolts, does VISA actually address sealift concerns or is it just a tourniquet to stop the hemorrhaging of the U.S. merchant marine?³⁰

Vessel Sharing Agreements

The globalization of ocean shipping, which is simply following the trend of most businesses, makes it more efficient and more effective for its customers. Vessel sharing agreements are representative of that. While the VISA program has its faults, it demonstrated efficacious foresight in allowing participants to take advantage of vessel sharing agreements. Correspondingly, those agreements provide a flexible framework of additional militarily useful sealift assets. But, what it really opens the door to, and it might not be a bad idea, is the greater use of foreign flag sealift.

²⁸ Daniels, 62.

²⁹ David J. Rall, Military Sealift Command Maritime Transportation Specialist, and Bill Kurfels, MARAD MSP/VISA Program Manager, telephone conversations with author, 6 April 2010.

³⁰ Lewis, 27.

Vessel sharing agreements are defined as an agreement between two or more carriers to transport cargo contracted for carriage with one of the carriers on the (shared) vessels of another.³¹ For example, in 2008, Maersk Line entered into a vessel sharing agreement with Malaysian International Shipping Corporation (MISC) Berhad, which is Malaysian owned. The agreement is only to share four small container ships operating between Southeast Asia and New Zealand, but Maersk and MISC Berhad entered it for economic reasons. The ability to earn a profit in that market, operating alone, no longer provided an acceptable rate of return on investments.³² Another way to look at vessel sharing agreements is that they allow a carrier to provide better service and service to locations that the carrier otherwise would not be able to offer.³³ What this means to the customer, and ultimately the United States military, is that cargo initially booked on a U.S. flagged ship in the Maersk fleet could end up on a Malaysian flagged ship at some point during transit, possibly a potential security concern.

VISA recognized these risks and incorporated safeguards to mitigate them. When a VISA participant decides to enter a vessel sharing agreement, USTRANSCOM and the Maritime Administration (MARAD) must approve it, and the participant should demonstrate adequate control over the shared capacity when utilized. “Adequate control” is not defined within the VISA agreement and, while it might not be needed in many cases, it might be required in others.

The events of September 11, 2001 profoundly affected the world and how it approached security. The United States, in 2007, began enforcing new personal identification requirements for those that worked in the U.S. maritime trade. In order to gain access to port areas, vessels, outer continental shelf facilities, workers now needed a Transportation Worker Identification Card (TWIC). Likewise, the law applied to all credentialed merchant mariners who sailed on U.S. flagged ships. To obtain a TWIC, an individual has to provide biographic and biometric information such as fingerprints, sit for a digital photograph and successfully pass a security threat assessment conducted by the

³¹ “Voluntary Intermodal Sealift Agreement,” United States Transportation Command, 9 December 1996, <<http://www.transcom.mil/j5/visa.pdf>> (7 March 2010)

³² Peter T. Leach, "Maersk, MISC Plan VSA," Traffic World 14 April 2008.

³³ “Vessel Sharing Agreement,” <http://www.maerskline.com/link/?page=brochure&path=/our_services/general_business_terms/Vessel%20sharing%20agreement> (17 April 2010).

Transportation Security Administration. It is anticipated that more than 1 million workers including longshoremen, truckers, port employees and others will be required to obtain a TWIC.³⁴

VISA, demonstrating prudence, pledges to provide replacement capacity when a participant's vessels are removed from regular service to support contingency operations. Per the VISA agreement, the Secretary of Transportation, through MARAD, shall establish procedures for the determination, duration, and use of suitable foreign flag replacement vessels, provided there will be a surplus of foreign flag vessels to fill that void. However, the recent TWIC regulations and requirements may make that more difficult to execute, possibly even undesirable. On the other hand, foreign vessels call on U.S. ports daily and without incident, so such an assumption might not be warranted.

Counter: Is Foreign Flag Shipping the Answer?

In light of current trends and the laws governing the U.S. merchant marine, it seems more and more likely that the United States, eventually, will not have a suitable U.S. flagged fleet plying international waters. Likewise, those same trends and laws seem to indicate that USTRANSCOM and MARAD are becoming more comfortable embracing foreign sealift as the most probable long-term alternative. In Desert Shield and Desert Storm, a total of 191 ships were chartered to carry equipment and provide related support. Foreign flagged vessels accounted for almost 80% of those.³⁵ The SMESA, in fact, reinforced how intermodalization and the use of foreign flag feeder ships successfully augmented organic sealift. With vessel sharing agreements and the efficiency of global super shipping conglomerates, it is probable that foreign flag shipping is the inevitable solution, whether the United States wants to admit it or not.

When one thoroughly examines the VISA concept, it is not all that bad. It makes sense; it is well structured and implementable. Whether or not there would be sufficient commercial shipping, of any flag, available to meet demand, let alone abandoned U.S. routes is debatable. The use of foreign flag shipping has potential, but there are some lurking down sides to relying on such a resource, either through the VISA program's vessel sharing

³⁴ "Program Information Transportation Worker Identification Credential (TWIC™)", <http://www.tsa.gov/what_we_do/layers/twic/program_info.shtm> (16 April 2010).

³⁵ Daniels, 18.

agreements or through the normal charter process. For example, it is naive to think that there will not be complications, such as delayed delivery of cargo or ships simply refusing to enter a war zone at some point.³⁶ Failing to address those concerns has foreseeable risks.

Operations Desert Shield and Desert Storm exposed those dangers, although not to a detrimental affect, but they exemplify what can happen. Of all the foreign flagged ships transporting U.S. cargo, only 13 refused or hesitated to enter the area of operations. Ironically, three were foreign manned feeder vessels operating under the SMESA, which occasioned the idea for VISA. Then there was the Bangladesh flagged vessel. It lost its contract in Oakland, CA as it prepared to load DoD cargo when most of its Muslim crew and officers jumped ship. The *Trident Dusk*, flying the Qatari flag and bound for Saudi Arabia with combat support equipment, refused to enter the combat zone even with a U.S. Navy escort. Its cargo was transferred to a Panamanian flagged vessel in Muscat, Oman resulting in the load reaching its final destination in Saudi Arabia 19 days late. From just these few examples, one can only speculate what might have occurred if there was actually a credible maritime threat.³⁷

The international maritime community responded to emerging security demands with its own changes via the International Safety of Life at Sea Convention (SOLAS).³⁸ In 2004, it passed amendments placing additional security responsibilities on commercial merchant ships. In particular, Regulation XI-2/8 states that the master shall not be constrained by anyone, be it the owner of the company or charterer, from making any decision necessary to maintain the safety and security of the ship. The regulations set forth under SOLAS govern most sea faring countries; there are currently 148 nations that have ratified it and abide by it.³⁹ It suffices to say that security of the vessel was always one of the master's responsibilities, but now that it is specifically codified it has arguably greater implications.

³⁶ Greg S. Thornton, "Foreign Flag Sealift: A Risky Business for the Combatant Commander," Thesis, U.S. Naval War College (Newport: U.S. Naval War College, 2005), 18.

³⁷ James K. Mathews and Cora J. Holt, "So Many, So Much, So Far, So Fast," (Washington, D.C.: Office of the Chairman of the Joint Chiefs of Staff and Research Center, United States Transportation Command, 1996), 136.

³⁸ SOLAS is an international treaty, first adopted in 1914 and amended many times since, governing the safety of ships including their construction, fire prevention, communications, navigation procedures, life-saving equipment, and security.

³⁹ "Who has to comply with ISPS code," <<http://www.imo.org/>> (24 April 2010).

Since the beginning of Operation Iraqi Freedom, embarked security teams (EST)⁴⁰ supplied force protection for U.S. flagged ships carrying military cargo while transiting significant choke points.⁴¹ More recently, on March 25, 2008, an EST aboard the U.S. flagged M/V *Global Patriot* opened fire on a small Egyptian boat, killing one and injuring two. The EST maintains that it followed established guidelines before opening fire. Military Sealift Command chartered the *Global Patriot* to carry used military cargo from Dubai back to the United States. While the two injured Egyptians stated that they were trying to sell merchandise to the ship, a common practice in that area, there are conflicting stories surrounding their intentions.⁴²

Almost two years later, during the week of March 24, 2010, private security guards aboard the Panamanian flagged M/V *Almezaan*, which is owned by the United Arab Emirates, shot and killed a Somali pirate off the coast of East Africa. It is believed to be the first killing by armed contractors. The question that lingers is who is ultimately responsible—the owner, the security guard contractor, the flagging nation, or someone else?⁴³

In May of 2008, insurance underwriters at the Lloyds of London designated the Gulf of Aden a war-risk zone subject to special insurance premium, which brokers estimated cost foreign flag shippers approximately \$10,000 to \$20,000 per trip through the area. U.S. rates were unaffected, as the U.S. had not encountered any acts of piracy requiring the payment of a ransom. Despite this exemption, war risk insurance will always play a part in the sealift calculus and is a concern the United States is prepared to mitigate. The Merchant Marine Act of 1936 provides a provision that the Secretary of Transportation, with approval from the President, may provide insurance for water-borne commerce of the United States, if it cannot be obtained on reasonable terms. At the request of DoD, MARAD underwrites marine risk insurance for DoD-chartered vessels,⁴⁴ but until the Secretary of transportation makes that designation, it might discourage foreign resources from cooperating. Vessel sharing

⁴⁰ ESTs are comprised of 12-15 armed U.S. personnel, usually marines.

⁴¹ Thornton, 17.

⁴² “American Ship fires at Suez Canal hawkers,” *The Australian*, 26 March 2008 sec. World, p. 9.

⁴³ Katherine Houreld, “Private guards kill Somali pirate for first time,” Associated Press, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/24/AR2010032403145_2.html> (18 April 2010).

⁴⁴ Rawle O. King, “Ocean Piracy and Its Impact on Insurance,” CRS Report for Congress, Congressional Research Service (Congressional Research Service, 2009), 6 and 9.

agreements, examined from this perspective, do not seem quite like the panacea that they appear to be.

When factoring in force protection, additional maritime insurance premiums, and the likelihood that non-U.S. flagged vessels may balk at entering a war zone, the VISA program seems like it might be worth more salt than originally this paper gives it credit. Again, conceptually it has merit. However, the global nature of maritime business in conjunction with a less-than-favorable future for U.S. flag shipping does not seem to support VISA as an enduring solution. If the United States does not approach sealift with the goal of leveraging that global power, leveraging it in a new way, it will find itself short changing the operational commander rather than providing a set of tools to enable success.

Recommendation

As it is naïve to rely on foreign flag shipping to save the day, it is equally naïve to think that the solution lies in building more U.S. flagged ships, especially building them in U.S. shipyards where they are cost prohibitive. In reality, the Combatant Commander may not necessarily care who owns the ship, what flag the ship is flying or what the nationalities of the master and crew are. What he does care about is that the equipment he needs arrives in theater on time to successfully accomplish his mission.⁴⁵ American ships cost more to build and repair, face stiffer safety regulations and are more expensive to operate. That trend is not going to change and, for better or worse, maritime policy is largely to blame.⁴⁶ The first step, however unpopular, is that the Jones Act needs to be amended. It is time to allow foreign companies to build ships that transport domestic trade and trade subject to cargo preference.

What *is* important to national security is that there are American companies in existence with suitable fleets of militarily useful vessels that can be called upon in times of crisis. Where they are built or flagged is not necessarily a concern. Likewise, the U.S. Coast Guard needs to establish more flexible regulations to make reflagging foreign flag vessels less cumbersome and costly.⁴⁷ Interestingly, foreign companies carry about 80% of liner

⁴⁵ Thornton, 6.

⁴⁶ Allen R. Ferguson, "Reform on Maritime Policy: Building blocks of an Integrated Program," Regulation The Cato Review of Business and Government, 1994: 29-30.

⁴⁷ Lewis, Ira and Coulter, Daniel Y., Transportation Journal, "The Voluntary Intermodal Sealift Agreement: Strategic Transportation for National Defense," pg 32.

traffic involved in U.S. trade.⁴⁸ Even though that data is 15 years old, one would find it difficult to argue that it has gone down since then. Why not have some of that 80% belong to U.S. owned companies? If there is a need to subsidize, subsidize shipbuilding for those companies so that when they do build new vessels, those vessels structurally meet military sealift requirements.

Coinciding with this change is the need to possibly further modify code from the Internal Revenue Service, known as Sub-Part F, which governs the taxation of controlled foreign corporations, e.g., U.S. owned shipping companies with foreign flag vessels. Prior to 1986, U.S. owned foreign flag vessels were allowed to defer taxes on foreign earnings, provided the earnings were reinvested in ships. This policy mirrored how other seafaring nations operated, but the elimination of it in 1986, according to the Federation of American Controlled Shipping, caused a sharp decline in American-owned foreign flag vessels.⁴⁹ In 2004 Congress realized the counterproductive impact of its 1986 legislation and repealed the reinvestment exemption.⁵⁰ It is unclear how this change impacted U.S. sealift capacity. If VISA and MSP are to transform into truly viable options, not just valid concepts, Sub-Part F might require further modification.

Maersk and NOL are evidence that the maritime industry is embracing globalization. Reliance on foreign shipping might be inevitable, but reliance on foreign owned bottoms is not. There are several examples where foreign manufactured products broke into a market that one might have thought, at one time, impossible.

In June 2006, Eurocopter, a subsidiary of the European Aeronautic Defense and Space company (EADS), won the contract to provide the U.S. Army with a replacement for its aging light utility helicopter, valued at \$3 billion.⁵¹ More recently, EADS continued its highly competitive quest in the long, drawn-out competition to build the next tanker for the U.S. Air Force—a contract valued at \$40 billion.⁵² So, why should the United States

⁴⁸ Ferguson, 30.

⁴⁹ Ferguson, 29.

⁵⁰ Winston and Strawn LLP, "Maritime & Admiralty Practice - IRS Clarifies Subpart F and Related Rules for Foreign Base Company Shipping Income," *Winston & Strawn*, July 1, 2008, <http://www.winston.com/siteFiles/publications/IRS_Clarifies_Subpart_F_Rules.pdf> (1 June 2010).

⁵¹ "LUH Program Win Lands Eurocopter in US Defense Market," <<http://www.defenseindustrydaily.com/luh-program-win-lands-eurocopter-in-us-defense-market-02398/>> (19 April 2010)].

⁵² Megan Scully, "EADS To Fly Solo In Bid For \$40B Air Force Tanker Deal," <http://www.nationaljournal.com/congressdaily/nsa_20100421_8330.php?mrefid=site_search> (21 April 2010).

continue to cling to its brittle branch, known as restrictive maritime regulations and laws, that only threaten to undo what little is left of the U.S. merchant marine? It is time to let foreign hulls into the game.

The benefits of vessel sharing agreements are hard to argue from a commercial perspective, and with the additional changes adopted by SOLAS in 2004, it is becoming more difficult to argue from a national security angle. Those changes are formally known as the International Ship and Port Facility Code (ISPS). It establishes an international framework involving cooperation between contracting governments, government agencies, local administrations and shipping and port industries. Their joint objective is to detect and assess security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade. It provides a methodology for security assessments, creating plans and procedures to react to changing security levels both in port and on board ship. Ships that are in compliance have an internationally recognized Ship Security Certificate, which is maintained in a publicly accessible ISPS database managed by the International Maritime Organization.⁵³ What this means is that all 148 nations that abide by SOLAS must maintain security plans, have security officers, and regularly practice security measures on board their ships. For sealift augmentation, it translates into a more appealing, more secure foreign flag alternative, comparable to some of the benefits found in the TWIC program.

The culminating solution is to establish new American-owned “APLs” and “Sealands” with highly competitive foreign flag fleets containing many militarily useful vessels, enrolled in overhauled VISA and MSP programs. But this alternative fails to address at least one key area: Who will crew those vessels in a time of crisis should the foreign crews balk, if that is indeed how the ships are crewed? Maybe U.S. licensed officers and crew will already be on board, maybe not. According to data from 2001, the federally funded United States Merchant Marine Academy (USMMA) at Kings Point, NY graduated 199 new third mates and third engineers. There are 7 other state-run schools that each graduated approximately the same amount.⁵⁴ USMMA is unique in that its graduates have obligations to work in the U.S. maritime industry for 5 years and serve in the Navy Reserve

⁵³ “How can I find out if a ship or port is compliant,” <<http://www.imo.org/>> (21 April 2010).

⁵⁴ Scott T. McCain, “Bolstering U.S. strategic sealift through coastal shipping,” Newsletter - United States Navy Supply Corps, Nov/Dec 2003: 14.

for 8 years.⁵⁵ Taxpayer dollars pay for each student's education and they should get their money's worth. These 5- and 8-year commitments can and should be restructured to assure the U.S. has a pool of well-trained, licensed officers by collaborating with the "new" U.S. shipping companies and by developing a serious Navy Reserve program focused on training and maintaining navigation and engineering expertise.

Lastly, the formation of international shipping alliances might be the last piece en route to a multilateral solution for augmenting sealift. Alliances have inherent benefits and an international sealift alliance, either part of the North Atlantic Treaty Organization (NATO) or the United Nations (UN) deserves more than just a passing consideration. NATO's Operation Allied Force⁵⁶ demonstrated how one of its reluctant allies, Greece, provided subdued support, making available to allies the use of one of its strategically located airfields and a similar port, rather than risk its good standing in the European Union and NATO. All the while, over 90% of the Greek population opposed NATO airstrikes.⁵⁷ That same type of allegiance could be leveraged for contingency sealift. Providing sealift—possibly American owned ships flying that country's flag—might be a more agreeable form of indirect support for reluctant countries which cannot provide military assets or are facing a population in which the majority oppose direct support.

Conclusion

Good intentions have not served America's maritime industry so well over the past century. The Military Transportation Act of 1904, Jones Act and Merchant Marine Act established a navigable course, but one that might not reach the desired port of call. While the Maritime Security Act of 1997, which brought about MSP and VISA, created the best framework to date to augment organic sealift, it seems like a tenuous solution at best, considering the current trend of the U.S. merchant marine.

Globalization and vessel sharing agreements are the relevant trends around which the U.S. needs to build its strategy, its capacity and its advantage. It does not need to enact more of the same defibrillative legislation to save the U.S. merchant marine. The Maritime

⁵⁵ "Service Obligation After Graduation," <<http://www.usmma.edu/admissions/facts/serviceobligation.htm>> (21 April 2010).

⁵⁶ Operation Allied force commenced in 1999. Its objective was to ensure the withdrawal of Yugoslav forces from Kosovo, stop its military action, and immediately end violence and repression.

⁵⁷ Derek S. Revron, "Coalition Warfare: The Commander's Role," *Defense & Security Analysis*, 2002: 109.

Administration Authorization Act of 2010, which is still in the approval process, is proposing that all ships part of the Naval auxiliary fleet be constructed in the United States—an ominous sign that threatens to further delay any potential changes.⁵⁸

One of the main objectives from the 2010 Quadrennial Defense Review is to build capabilities to deal with future threats. It is questionable that VISA is poised to meet that charge. It is time for MARAD to chart a new course and assure that operational planners have an executable sealift solution to meet the demands of tomorrow, and, more importantly, the day after tomorrow.

⁵⁸ R.G. Edmonson, “Senate Bill Would Require U.S. Flag Ships to be U.S. Built.” *Journal of Commerce Online*, 10 July 2009. <<http://www.joc.com/maritime/senate-bill-would-require-us-flag-ships-be-us-built>> (21 April 2010).

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